In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 563

SIMON W. HENDERSON, JR., INDEPENDENT EXECUTOR FOR THE ESTATE OF LOUISE R. HENDERSON, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner asks this Court to review two questions. He first argues that the district judge who sat on, and wrote the opinion of, the panel of the court of appeals that heard this case below, was disqualified from sitting because, in petitioner's view, either 28 U.S.C. 292(a), which allows the designation of a district judge to sit on a court of appeals, is unconstitutional, or that judge violated 28 U.S.C. 47 by hearing "an appeal from the decision of a[n] * * * issue tried by him." The second question is whether the court below properly found that there was an inadequate evidentiary basis for the conclusion of the district court that Louise R. Henderson was entitled to a business bad

debt deduction for amounts she advanced to the MacKay Corporation, of which she was a substantial stockholder.

Petitioner's attacks upon the propriety of the district judge sitting on the court of appeals are entirely without merit. On the record here, the court of appeals was correct in concluding that there was no basis for the district court's ruling that Mrs. Henderson's advances to MacKay were loans made in the course of a business of lending money. There is no conflict or other basis for review in this Court.

1. District Judge Johnson was assigned to sit on the court of appeals pursuant to 28 U.S.C. 292(a), which authorizes the chief judge of a circuit to assign district judges within the circuit to sit upon the court of appeals whenever the business of that court so requires. The assignment also conformed to Rule 36 of the rules of the Court of Appeals for the Fifth Circuit and to 28 U.S.C. 43(b) (Pet. 39).[1]

This Court has long and consistently rejected claims such as petitioner's that the assignment provisions of the Judicial Code usurp the power of appointment and confirmation of judges that the Constitution vests in the President and Senate. Thus, in *Lamar* v. *United States*, 241 U.S. 103, 118, this Court rejected such an attack on the designation under a predecessor of Section 292(a) of a judge from a district in one circuit to hold a district court in another circuit, as resting "upon a premise conflicting with the practice

[1] See, generally, *Tobin* v. *Ramey*, 206 F. 2d 505 (C.A. 5), for the background of the statutes and rule.

of the Government under the Constitution substantially from the beginning." As long ago as 1803 this Court declared that the question of the Congressional power to assign judges from one court to another was "at rest." *Stuart* v. *Laird,* 1 Cranch 299, 309. Only a few years ago, in *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 584, this Court sustained the authority of the Chief Justice under 28 U.S.C. 293(a) and 294(d) to assign active and retired judges of the Court of Claims and the Court of Customs and Patent Appeals to serve on United States District Courts and Courts of Appeals, stating that once the matter of such assignments has been legislatively resolved "it can scarcely rise to the dignity of a constitutional question."

Petitioner's claim (Pet. 11–17) that District Judge Johnson "had decided the identical issue" in the district court does not have the factual basis 28 U.S.C. 47 requires. The argument is founded on Judge Johnson's decision in *Frederick Henderson and Louise Henderson* v. *United States,* 245 F. Supp. 782 (M.D. Ala.) (Pet. C–1—C–9), holding that advances to a corporation were capital contributions. The only similarity between that and the instant case is that both dealt with the issue whether advances were loans or capital contributions, and both involved taxpayers having the surname Henderson and the given name Louise. The Louise Henderson in the Alabama case is not the same person as the Louise R. Henderson in this case. The corporations to which advances were made are not the same. Section 47 of the Judicial Code was designed to make certain that a judge

would not sit on an appeal from his own decision. It was not intended to prohibit a judge from hearing in one case an appeal of legal questions that he had decided in a different case involving different parties. *Delaney* v. *United States*, 263 U.S. 586; *Rexford* v. *Brunswick-Balke Co.*, 228 U.S. 339; *Moran* v. *Dillingham*, 174 U.S. 153; *Lee* v. *United States*, 91 F. 2d 326 (C.A. 5), certiorari denied, 302 U.S. 745; *Tinkoff* v. *United States*, 86 F. 2d 868 (C.A. 7), certiorari denied, 301 U.S. 689.

2. Louise R. Henderson was not entitled to deduct as business bad debts under Section 166(a) of the Internal Revenue Code of 1954 the amounts she advanced to MacKay Foundry, Inc. unless she could show, as a matter of fact, three propositions: (1) the advances constituted true loans rather than contributions of capital investments to the corporation; (2) if the advances were loans, that she was in the lending business; and (3) if she was in the lending business, the advances to MacKay were made pursuant to that business.

The record here required the court of appeals to hold, "The facts, which are in large part undisputed, simply do not support the findings and conclusions made by the trial court that the taxpayer satisfied her burden of proof." (Pet. B-23.) See *Commissioner* v. *Duberstein*, 363 U.S. 278, 291; *United States* v. *Gypsum Co.*, 333 U.S. 364, 395. Indeed, not a single one of the three conditions precedent to a business bad debt was proved.

The record compels the conclusion that the purported "loans" by taxpayer to the corporation were

in substance contributions to its equity capital. The "loans" were subordinate to claims of all other creditors (R. 363–364, 525, 806).[2] They were intended to be repaid only out of profits (R. 344–345, 502–503). No "interest" or "principal" was ever paid (R. 39). Neither Mrs. Henderson, MacKay, or its creditors treated the advancements any differently than her contributions *qua* stockholder.

Even assuming, arguendo, that the advances gave rise to the indebtedness, Mrs. Henderson plainly was not engaged in the business of lending money. While over many years she made numerous "loans" (R. 42–47), they were primarily to companies in which she had a financial interest or to persons she desired to assist (R. 266–270, 462–463, 553). During the years in question, 1953 through 1956, other than the advances to MacKay, taxpayer made a total of only seven "loans" (Pet. B–26; R. 42–47). On some interest was charged, others not. The very tabulation on which petitioner relies (Pet. 30–31) shows that a substantial amount of the "loans" was never repaid, and that the interest collected was insubstantial.[3]

Moreover, this Court has decided that even frequent lending of money does not alone establish that a taxpayer was in the *business* of lending. *Whipple* v. *Commissioner,* 373 U.S. 193; *Higgins* v. *Commissioner,* 312 U.S. 212. Mrs. Henderson's activities completely lacked the usual characteristics of being in that busi-

[2] "R." references are to the printed record filed in the court below.

[3] The table shows for example, that at no time during 1953 was the amount allegedly outstanding as "loans" less than $800,000, and that "Interest Collected" that year was $5,561.83.

ness. She did not advertise or hold herself out as being in the lending business (R. 392–393, 457, 557). The activity did not occupy a substantial amount of her or her employees' time (R. 273). Nor was her lending activity pursued for the purpose of deriving a profit as compensation for her and her employees' activities (R. 391–393).

Even assuming further, arguendo, that Mrs. Henderson was in the business of lending money, the court of appeals was correct in reversing the district court since the record clearly shows that the advances were not made in the course of a money-lending business, but were accommodation, nonprofit loans made for purely personal reasons—to aid her granddaughter's husband (R. 486). Mrs. Henderson continued to advance the money, on an unsecured basis, when she knew that MacKay's business was deteriorating and incurring substantial losses (Pet. B–19, B–20). She expected repayment of principal and payment of interest only after profits should become available (R. 344–345, 502–503). In no sense were the advances to MacKay made for a normal business purpose. The resulting bad debts, if they were such, had no proximate connection with any activity which the tax laws recognize as a trade or business. Cf. *Whipple* v. *Commissioner, supra,* at 201–202.

The district court wrote no opinion. Its conclusory "findings" and "conclusions" (Pet. B–3—B–12) rest on nothing more than the issuance of documents labeled "notes", book entries purporting to evidence "loans" (R. 38–39), and the self-serving testimony of Mrs. Henderson's son, who was her agent, and the

other participants in the corporation, as to what was "intended" (summarized at Pet. 8)—labels and declarations flatly contradicted by what those persons admitted was actually done (R. 344–346, 363–364, 463–466, 502–503).

Had the court of appeals affirmed on this record, it would have permitted sheer form to prevail over substance. By reversing it correctly decided this case, on its unique facts, in accord with the applicable principles of law laid down by this Court. Petitioner's reference (Pet. 18–23) to decisions of other courts of appeals, which turned on different sets of facts, raise no question of a conflict.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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